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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/445,796	03/13/2000	DOMINIQUE BRASSART	P99.2625	1391
29157	7590	09/08/2004	EXAMINER	
BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135			AFREMOVA, VERA	
			ART UNIT	PAPER NUMBER
			1651	

DATE MAILED: 09/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

09/445,796

Applicant(s)

BRASSART ET AL.

Examiner

Vera Afremova

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 August 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ they raise the issue of new matter (see Note below);
  - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☐ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: none.Claim(s) objected to: none.Claim(s) rejected: 11-14, 16-19 and 21-26.Claim(s) withdrawn from consideration: none.

8. ☐ The drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

**Attachment to Advisory Action**

Applicants' arguments and request for reconsideration filed on 8/23/2004 have been fully considered but does not overcome the rejection(s).

As related to claim rejection under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement, applicants' arguments are directed to the subject matter that is a nutritional composition or a product. However, the rejected claims are directed to a method of administration of a nutritional composition or to a method of using a product. While the as-filed specification might have a written support for a product including both fermented and non-fermented nutritional compositions with lactic bacteria, the as-filed specification does not provide written support for a method of using a non-fermented nutritional composition with lactic bacteria for in vivo administration related to treatment or prophylaxis of calcium deficiencies. One applicants' argument is relied upon specification page 4, lines 32-33, wherein product is disclosed as "may be fermented". The other applicants' argument is relied upon the specification examples 1 and 4 wherein there is no disclosure related to a method of in vivo administration. The disclosure of examples 1 and 4 is solely related to an in vitro testing of lactic bacteria in a test tube environment and to a method of making lactic bacteria containing composition. Applicants argue that the disclosure needs only reasonably convey to persons skilled in the art that the inventor had possession of the subject matter in question. Yet, the subject matter of presently claimed invention is a method of administration of a non-fermented product with lactic bacteria not a non-fermented product per se.

As related to claim rejection under 35 U.S.C. 103 applicants' arguments are substantially similar to the arguments filed in the prior response. With regard to the reference by Sellars

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applicants argue that it only recognizes the beneficial effects of lactic bacteria fermented products as related to mineral absorption. This is not true because Sellars points out that the colonization of GI tract by lactic bacteria promotes rate of mineral absorption (page 100, par. 3, lines 5-6). Thus, Sellars recognizes that the lactic bacteria are beneficial factors and/or active ingredients of nutritional compositions whether these nutritional compositions are fermented or not.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Afremova whose telephone number is (571) 272-0914. The examiner can normally be reached from Monday to Friday from 9.30 am to 6.00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached at (571) 272-0926.

The fax phone number for the TC 1600 where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.

Vera Afremova

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September 3, 2004



**VERA AFREMOVA**  
**PRIMARY EXAMINER**